NO. 78-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

INTERSTATE COMMERCE COMMISSION,
PETITIONER

v.

CHICAGO AND NORTH WESTERN
TRANSPORTATION COMPANY, *ET AL.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE OFFICE OF RAIL PUBLIC COUNSEL AS AMICUS CURIAE

HOWARD A. HEFFRON,
Director,

MILTON J. GROSSMAN,
Associate Rail Public Counsel,

Office of Rail Public Counsel,
1030 15th Street, N.W.,
Suite 200,
Washington, D.C. 20005

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

INDEX

Page

THE INTEREST OF THE OFFICE OF RAIL PUBLIC COUNSEL 1

ARGUMENT 3

CONCLUSION 11

CITATIONS

Cases:

American Farm Lines v. Black Ball Service, 397 U.S. 532, 541 (1970) 8

Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945). 8

Chesapeake & Ohio Ry. v. Public Service Commission, 242 U.S. 603 (1917) 9

FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 142-43 (1940). 10

FCC v. Schreiber, 381 U.S. 279, 289-90 (1965). 10

Northern Indiana Pub. Serv. Co. v. Porter County Chapter of the Izaak Walton League, 423 U.S. 12, 14 (1975). 8

Southern Ry. v. North Carolina, 376 U.S. 93, 104-105 (1964). 9

Udall v. Tallman, 380 U.S. 1, 16-17 (1965) 8

Vermont Yankee Nuclear Power Co. v. Natural Resources Defense Council, 98 S. Ct. 1197 (1978). 10

Statutes and Regulations

49 U.S.C.:
§ 1a 4, 9
§ 17 7
§ 26b 1, 2, 3
§ 1654 . . . . . 3, 5, 6

49 C.F.R.:
§ 266.15(c) 5
§ 1121.38 8

Miscellaneous:

ICC Notice of Procedures for Pending Rail Abandonment Cases, 41 Fed. Reg. 13691 9

ICC Rail System Diagram Update (March 1978) 4

S. Rep. No. 94-499, 94th Cong., 1st Sess. 44 (1975) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-411

INTERSTATE COMMERCE COMMISSION,
PETITIONER

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, *ET AL.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE OFFICE OF RAIL PUBLIC COUNSEL AS AMICUS CURIAE

This memorandum is filed in support of the Interstate Commerce Commission's petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

THE INTEREST OF THE OFFICE OF RAIL PUBLIC COUNSEL

The Office of Rail Public Counsel is a new independent agency of the federal government, established by act of Congress (Section 304 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4R Act"), Public Law 94-210, Feb. 5, 1976, 49 U.S.C. § 26b), with the unique statutory mission to provide "constructive representation of the public interest in safe, efficient, reliable and

economical rail transportation services" (49 U.S.C. § 26b(4)(e)) before the Interstate Commerce Commission ("ICC"), other federal agencies, and the courts. The Act states in pertinent part that the Office:

> (a) shall have standing to become a party to any proceeding, formal or informal, which is pending or initiated before the Commission and which involves a common carrier by railroad subject to this part;
>
> (b) may petition the Commission for the initiation of proceedings on any matter within the jurisdiction of the Commission which involves a common carrier by railroad subject to this part;
>
> (c) may seek judicial review of any Commission action on any matter involving a common carrier by railroad subject to this part, to the extent such review is authorized by law for any person and on the same basis;
>
> (d) shall solicit, study, evaluate, and present before the Commission, in any proceeding, formal or informal, the views of those communities and users of rail service affected by proceedings initiated by or pending before the Commission, whenever the Director determines, for whatever reason (such as size or location), that such community or user of rail service might not otherwise be adequately represented before the Commission in the course of such proceedings; and
>
> (e) shall evaluate and represent, before the Commission and before other Federal agencies when their policies and activities significantly affect rail transportation matters subject to the jurisdiction of the Commission, and shall by other means assist the constructive representation of,

> the public interest in safe, efficient, reliable, and economical rail transportation services. . . . (49 U.S.C. § 26b(4))

The Office was not in a position to participate in the briefing and oral argument of the case before the Court of Appeals which was held on September 12, 1977. The first director of the Office, following confirmation by the Senate, was appointed by the President on December 16, 1977, and took office on December 23, 1977, three months after the oral argument had been held.[1] This occasion is, therefore, the first opportunity for the Office to participate in this important case.

The Office is presenting this memorandum in support of the ICC's petition for a writ of certiorari in the belief that the case is of major significance to states, communities and users of rail services throughout the nation, presenting an issue of fundamental importance to the future of branch line operations and to the efficacy of the Local Rail Service Assistance program. 4R Act § 803, 49 U.S.C. § 1654.

ARGUMENT

1. On September 20, 1978, there were 115 applications to abandon branch lines pending before the ICC. In addition, six months earlier (the latest date for which such figures are available) 340 lines were identified by carriers as lines they will seek to abandon within three years. The nation's railroads also reported to the Commission the fact that they are studying another 179 lines before deciding

[1] For much of 1978, the Office was engaged in the initial tasks of organization and recruiting. Thus, the Office was not in a position to participate in the ICC's petition for rehearing filed after the Court of Appeals' decision of May 30, 1978.

whether to abandon these as well. Altogether these lines represent over 16,000 rail miles.[2]

The branch lines threatened with abandonment are dispersed throughout the nation. Thirty-three states have one or more lines which are presently the subject of pending abandonment proceedings and nine additional states have lines which the railroads have announced they will abandon over the next three years.

These lines are of every size and description. The shortest covers a distance of just over a mile;[3] the longest is 144 miles long.[4] They service communities of virtually every size and description—from country hamlets to major towns and even cities. The shippers and industries which could be affected by these pending and projected abandonments range from small family-owned businesses to larger corporate concerns. A review of these figures plainly indicates that the problem of branch line abandonments is a national one, of concern to communities, shippers and carriers in every corner of the nation.

2. Congress was well aware of the national economic importance of abandonment issues and of the need for careful balancing of the competing interests when it enacted the Railroad Revitalization and Regulatory Reform Act of 1976. Title VIII, under the heading of "Local Rail Service Continuation," sets out detailed

[2] These figures are compiled by the ICC from data supplied to the agency in the transportation system diagrams carriers must prepare pursuant to § 802 of the 4R Act, 49 U.S.C. § 1a(5)(a). The latest compilation of these figures was published by the ICC in its March 9, 1978, *Rail System Diagram Update*.

[3] The Seaboard Coast Line is currently seeking to abandon its line between Astatula, Fla., and Franks Farm, Fla. The line is 1.09 miles long. ICC *Rail System Diagram Update* (March 9, 1978), at 8.

[4] This line runs between Bonita Junction, Tex. and Seagoville, Tex., and is operated by Southern Pacific. *Id.* at 24.

procedures every railroad seeking to abandon a line must follow before such abandonment will be authorized. The core of this program is contained in § 802(6)(a)—the provision at issue here. This section creates a mechanism "financially responsible persons" (usually state or local governments) may contract with a railroad for continued service on vital branch lines which would otherwise be subject to abandonment. They may do so by agreeing to make rail service continuation payments to the railroad which will cover its losses and also guarantee it a reasonable return on the value of its line.[5] In that same Title VIII Congress made federal funds available to the States to assist them in making these rail service continuation payments. *See* § 803, 49 U.S.C. § 1654.

To be eligible to receive federal rail assistance, a state must first establish an "adequate plan for rail services" in the state. § 803(j) 49 U.S.C. § 1654(j). Thus, the statute gives state and local officials the responsibility of assessing the essentiality of each rail line within the state and developing an integrated statewide rail services plan. This plan must be "part of an overall planning process for all transportation services in the state." *Ibid.* Under regulations promulgated by the Secretary of Transportation, the plan must identify all rail lines which are eligible for federal assistance. 49 C.F.R. § 266.15(c)(3)(iii). Furthermore, the plan must "group projects for which the State may seek assistance . . . in order of compliance with the State's criteria and goals for assistance . . ." *Id.* at (c)(5). The significance Congress

[5] The Act requires that the rail service continuation payment cover the avoidable costs of providing the service and a reasonable return on the value of the line. § 802, 49 U.S.C. § 1a(6)(a)(ii). These terms are defined in § 802(10), 49 U.S.C. 1a (11) as including in the case of avoidable cost "all expenses which would be incurred by a carrier in providing a service which would not be incurred . . . if such service . . . were abandoned" and in the case of reasonable return, "the mean cost of capital."

attached to the entire program is indicated by the fact that the 4R Act authorized the appropriation, without fiscal year limitation, of $360 million for this purpose.[6] § 803(o), 49 U.S.C. § 1654(o).

The effect of these provisions is to ensure that each state will decide for itself on the basis of a statewide system plan which lines are essential to its overall transportation needs and therefore worth subsidizing. The Senate Committee report accompanying S. 2718 (the Senate's version of the 4R Act which is identical in language, as far as is pertinent, to the statute ultimately enacted) explains the purpose of this statutory scheme as follows:

> [T]he Committee sought to address two basic concerns. First, that the rail system in this Nation must not be forced to continue to internalize all losses from branch line operations. . . .
>
> Of paramount concern to the Committee is the impact of rail abandonments on local communities, mostly rural in character. The Local Rail Service Assistance Program [§ 803] offers these communities an opportunity to keep their rail services. *It rightfully places the responsibility for making the decisions on the essentiality of local rail service with State and local officials.* (Emphasis added.)

S. Rep. No. 94-499, 94th Cong., 1st Sess. 44 (1975).

[6] The statute specifies that the "Federal share of the costs of any rail service assistance program shall be . . . 80 percent for the period from July 1, 1978, to June 30, 1979; and . . . 70 percent for the period from July 1, 1979, to June 30, 1981." § 803(g), 49 U.S.C. § 1654(g).

The Act also provides that the funds may be utilized for the acquisition of lines or the rehabilitation of rail properties on lines threatened with abandonment as well as for rail service continuation payments.

Under the Court of Appeals' holding, a state that has listed a branch line as eligible for federal assistance as a part of its state rail services plan, has obtained federal assistance and provided matching local funds, and then has offered the railroad a rail service continuation payment to cover the avoidable costs of providing service, *plus* a reasonable return on the value of the rail properties involved may, nonetheless, retain its rail service only at the sufferance of the railroad. For, if the railroad involved is not disposed to accept the subsidy offer, even though that offer fully complies with the statutory standard, the railroad may proceed to abandon the line. Indeed, no matter how generous the subsidy offer may be, the railroad, for its own corporate reasons, may decline to negotiate and deprive the community of any "opportunity" of keeping its rail service. Thus, contrary to the Congressional intent, the decision on whether local rail service should be continued will lie in the final analysis, with the railroads—not with state and local officials.

3. The regulatory measure which the Commission wishes to use to prevent frustration of the statutory scheme in these circumstances is the authority to reconsider its decision authorizing the abandonment itself. Section 17(9)(g) of the Interstate Commerce Act, 49 U.S.C. § 17(9)(g) expressly grants to the Commission the authority upon its own initiative at any time to reopen a proceeding and reconsider its decision on the grounds of new evidence or substantially changed circumstances. Although its decision is not absolutely clear, we do not understand the Court of Appeals to question that abandonment decisions of the Commission, like any other decision, may be reconsidered under § 17(9). There also appears to be no dispute that if the Commission properly invokes its authority to reconsider an abandonment decision, it can and should postpone issuance of the abandonment certificate, notwithstanding the

six-month time limit of § 1a(6).[7] The Court of Appeals held, however, that this broad grant of reconsideration authority was of no avail to the Commission because the failure of the carrier and the local interests to reach agreement on a subsidy arrangement could in no event be regarded as a substantially changed circumstance.

In reaching this result, the Court of Appeals appears to have given controlling weight to its own interpretation of the section of the Commission's abandonment regulations providing that: "The Commission shall not consider an offer of financial assistance or any resulting agreement in making its initial finding on the merits of abandonment or discontinuance application[s]."[8]

The Court's failure to give proper weight to the Commission's own explanation of that regulation, *see Northern Indiana Pub. Serv. Co. v. Porter County Chapter of the Izaak Walton League*, 423 U.S. 12, 14 (1975); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945), led in this instance to a patent misinterpretation.

The Commission's regulation was designed to assure the local interests that they would not be prejudiced in their *opposition* to an abandonment application if they were promptly to file an offer of financial assistance, to become

[7] There is no tenable basis for a contrary position. Nothing in the 1976 amendments to the ICC Act in any way exempts abandonment orders from being subject to reconsideration under § 17(9)(g). Nor is there any direct conflict between the Commission's obligation to issue an abandonment certificate no later than six months after a final decision authorizing abandonment and the Commission's authority to reconsider its decision — While a Commission decision is being reconsidered, it does not become final. *See American Farm Lines v. Black Ball Service*, 397 U.S. 532, 541 (1970).

[8] 49 C.F.R. § 1121.38(h)(3).

operative in the event that the Commission approved abandonment.[9] In other words, the Commission will not approve abandonments that it would otherwise reject, merely because an offer of financial assistance had been made. But when the Commission does approve an abandonment application under the broad "public convenience and necessity" criterion,[10] it necessarily acts within the framework of the total regulatory scheme — *i.e.*, with knowledge that there is a process whereby state or local interests can arrange to have a losing service continued through subsidization if they want it badly enough. If such a mechanism did not exist, the Commission surely would be entitled to deny rather than permit abandonments in close cases of balancing regional needs against carrier losses. *Cf. Southern Ry. v. North Carolina*, 376 U.S. 93, 104-105 (1964); *Chesapeake & Ohio Ry. v. Public Service Commission*, 242 U.S. 603 (1917).

Since the Commission is entitled to take into account the existence of the subsidization process (entirely without regard to the nature of any particular offer made under that process), it follows that the failure of a carrier and local interest to reach agreement on a subsidization arrangement is a possible indication of a changed circumstance affecting the abandonment decision itself. The failure to reach agreement on a subsidy arrangement may or may not reflect a breakdown in the scheme contemplated

[9] See March 31, 1976, Notice of Procedures for Pending Rail Abandonment Cases, 41 Fed. Reg. 13691, at 13692.

[10] While the 1976 amendments were designed to streamline and expedite the abandonment process, they did not relax the substantive standards governing the Commission's exercise of its authority. That standard remains "the public convenience and necessity." Indeed the 1976 amendments added a direction to the Commission to consider whether the abandonment would cause "serious adverse impact on rural or community development." Interstate Commerce Act § 1a(4)(a), added by 4R Act § 802(4)(a), 49 U.S.C. 1a(4)(a).

by the statute. If the failure to reach agreement is simply the result of the fact that the offer which initially appeared "likely to" adequately compensate the carrier for continued service in fact does not do so, there is no breakdown in the system. On the other hand, if the offer would in fact adequately compensate the carrier for its continued service but the carrier has arbitrarily refused to accept it, then there is some real evidence of a breakdown. The Commission's reservation of authority to inquire into the circumstances of non-agreement represents an entirely responsible exercise of its general authority to reconsider decisions under the Interstate Commerce Act. In denying the Commission that authority, the Court of Appeals overstepped the bounds of its review authority. *See Vermont Yankee Nuclear Power Co. v. Natural Resources Defense Council*, 98 S. Ct. 1197 (1978); *FCC v. Schreiber*, 381 U.S. 279, 289-90 (1965); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142-43 (1940).

CONCLUSION

The Court of Appeals' decision undermines the careful balance of competing interests which Congress built into the abandonment provisions of the 4R Act. It threatens seriously to impair the national policy of facilitating the continued operation of rail services which local interests need and are willing to support financially. For the reasons stated above, the Office of Rail Public Counsel urges that the petition for certiorari of the Interstate Commerce Commission be granted.

Respectfully submitted,

HOWARD A. HEFFRON,
Director,

MILTON J. GROSSMAN,
Associate Rail Public Counsel,

Office of Rail Public Counsel,
1030 15th Street, N.W.,
Washington, D. C. 20005.

October 10, 1978